No. 89-531

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

MOUNTAIN STATES TELEPHONE AND TELEGRAPH CO., d/b/a MOUNTAIN BELL, a Colorado Corporation, *Petitioner*,

v.

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO, and THE HONORABLE WILLIAM G. MEYER, one of the judges thereof, *Respondents*.

On Petition for a Writ of Certiorari to the Supreme Court of Colorado

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF EDISON ELECTRIC INSTITUTE, PACIFIC TELESIS GROUP, AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, AND VISA U.S.A. INC. AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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In accordance with this Court's Rule 36, Edison Electric Institute, Pacific Telesis Group, American Bankers Association, American Financial Services Association, and Visa U.S.A. Inc. have sought the written consent of the

parties to file a brief as *amici curiae* in support of the petition of Mountain States Telephone and Telegraph Co. ("Mountain Bell" or the "Company") for a writ of *certiorari*. Mountain Bell has provided its written consent, which has been lodged with the Clerk, but counsel for the class action plaintiffs have withheld their consent.

The *amici curiae* and their subsidiaries and member institutions are engaged throughout the United States in the electrical power, telecommunications, and financial services industries. Every month, these companies mail bills, statements, and other correspondence to millions of customers nationwide. They have a strong interest in protecting their First Amendment right to control the contents of their periodic mailings, and thus they have a strong interest in the outcome of this case.

The *amici curiae* believe that they are in a position to assist the Court in assessing the deleterious implications of the Colorado Supreme Court's opinion. That opinion, which upheld the order of the United States District Court for the City and County of Denver, Colorado, would require Mountain Bell to mail to all of its customers in Colorado, as an insert in its monthly billing envelopes, a notice of a class action lawsuit brought against the Company. That notice repeats the representative plaintiffs' unsubstantiated allegations of wrongdoing on the part of Mountain Bell. If this Court does not issue a writ of *certiorari* and reverse the opinion of the Colorado Supreme Court, businesses such as those represented by the *amici curiae* may be forced to disseminate equally unsubstantiated and antagonistic allegations made in other class action lawsuits brought against them, in violation of their fundamental First Amendment rights. In that event, the potential customer confusion and loss of goodwill would be enormous.

In short, the Colorado Supreme Court's opinion could have significant nationwide repercussions, as set forth more fully in the accompanying brief of the *amici curiae*.

WHEREFORE, the *amici curiae* respectfully request that the Court grant their motion for leave to file the accompanying brief in support of Mountain Bell's petition for a writ of *certiorari*.

Respectfully submitted,

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In accordance with this Court's Rule 36, Edison Electric Institute ("EEI"), Pacific Telesis Group, American Bankers Association, American Financial Services Asso-

ciation ("AFSA"), and VISA U.S.A. Inc. have filed the foregoing motion for leave to file this brief as *amici curiae* in support of Petitioner Mountain States Telephone and Telegraph Co. ("Mountain Bell" or the "Company"). The *amici curiae* requested the written consent of the parties to file this brief, but only Mountain Bell provided such consent, which has been lodged with the Clerk. Counsel for the class action plaintiffs withheld their consent. Having filed their motion, the *amici curiae* now respectfully submit this brief.

INTRODUCTION

In this case, Mountain Bell has been ordered by the District Court for the City and County of Denver, Colorado (the "District Court") to mail to all of its customers in Colorado, as an insert in its monthly billing envelopes, a notice of a class action lawsuit brought against the Company. The notice repeats the plaintiffs' allegations (1) that Mountain Bell "acquired and maintains a monopoly over the market for inside wire maintenance and repair services contrary to Colorado antitrust law" and (2) that the Company's inside wire maintenance contracts "are void or voidable because of fraud practiced by [the Company] and under principals [sic] of contract law and Colorado deceptive practices law." Petition of Mountain Bell for Writ of Certiorari to the Supreme Court of Colorado ("Petition") at 35a. The notice also states that Mountain Bell has denied these claims and charges.

The Company sought review of the District Court's order in the Colorado Supreme Court on the grounds that the order violates its First Amendment rights. The Colorado Supreme Court upheld the District Court's order in an opinion entered on July 24, 1989, and Mountain Bell now petitions this Court for a writ of *certiorari*. The *amici curiae* vigorously support Mountain Bell's petition.

INTEREST OF *AMICI CURIAE*

EEI is the national association of investor-owned electric utility companies in the United States. Its members serve approximately 96 percent of all customers of the investor-owned segment of the electric utility industry and 74 percent of the nation's electricity users. EEI members mail approximately 79 million monthly billing envelopes to their customers nationwide.

Pacific Telesis Group is the California-based holding company formed as a result of the Bell System divestiture. Pacific Telesis Group has two Bell Operating Company subsidiaries—Pacific Bell and Nevada Bell—and several diversified subsidiaries, including cellular, paging, business telecommunications systems, and real estate operations. Pacific Bell and Nevada Bell are public utility companies providing telecommunications services to a majority of the people in the states of California and Nevada. Pacific Bell sends out approximately 14 million monthly billing envelopes to its customers in California. PacTel Cellular and the partnerships in which it participates provide cellular telephone service to hundreds of thousands of customers in California, Nevada, and several other states. In addition, PacTel Paging provides radio-paging service to over 300,000 subscribers spread across several states. Each of these businesses bills its customers for monthly service.

The American Bankers Association is the largest national trade association of the commercial banking industry in the United States. It has as members commercial banks in each of the fifty states and the District of Columbia, and those members hold approximately 95 percent of domestic assets of all United States commercial banks. Among other things, commercial banks make regular mailings to customers of credit card bills, checking account statements, Internal Revenue Service forms, dividend checks, and proxy statements.

AFSA is the nation's largest trade association representing nonbank providers of consumer financial services. Organized in 1916, AFSA represents 572 companies engaged in the extension of consumer credit throughout the United States. These companies range from independently-owned consumer finance offices to the nation's largest financial services, retail, and automobile companies. Consumer finance companies hold over $143 billion of consumer credit outstanding and over $38 billion in second mortgage credit, representing one quarter of all consumer credit outstanding in the United States. AFSA members include some of the largest bank and retail credit card issuers in the United States. These companies alone mail more than 70 million monthly billing statements.

Visa U.S.A. Inc. is a membership corporation consisting of over 19,163 United States financial institutions that participate in the Visa card program. Visa U.S.A. members have issued approximately 120,000,000 cards in the United States. In order to handle those accounts properly, Visa members typically and primarily rely on the mailing of periodic statements to their cardholders, generally on a monthly basis.

The periodic mailings made by the *amici curiae* and their members constitute the primary channel of communications between those companies and their customers. The companies carefully plan the contents of their mailings to promote readability and avoid potential customer confusion, to advise customers of important business developments, to solicit customer comments about their services, and generally to maintain good customer relations. For these reasons, any judicial decisions or regulatory orders that dictate, restrict, or augment the contents of those mailings affect the companies' fundamental First Amendment rights. Thus, the *amici curiae* have a strong interest in the outcome of this case.

Indeed, as numerous cases in recent years demonstrate, there have been increasing efforts on the part of third parties to gain access to business company mailings in order to promote their own social, political, and economic agendas. In *Pacific Gas and Electric Co. v. Public Utilities Commission*, 475 U.S. 1 (1986), this Court turned back those efforts and upheld a company's First Amendment right to decide what to include and what not to include in its monthly billing envelopes.

Unless this Court issues a writ of *certiorari* in this case and reverses the decision of the Colorado Supreme Court, the District Court's order will seriously undermine the protections afforded by *Pacific Gas and Electric* to companies such as the subsidiaries and member institutions of the *amici curiae*. That is because each such company will be required to disseminate to its customers, in the same envelope and with the same apparent dignity as its own regular correspondence, the unsubstantiated allegations of every class action plaintiff with an axe to grind against it. Such antagonistic bill inserts would poison and disrupt the very customer relationships that each company seeks to nurture by means of its periodic mailings.

This Court's prior decisions leave no doubt that forced association with the hostile views of others is unconstitutional under the First Amendment. In the case of class action notices, the hostile views of the plaintiffs are not mitigated by an acknowledgment in the notice that the defendant has denied the allegations. Furthermore, if defendants in class action lawsuits can be required to disseminate the views of class action plaintiffs at the outset of litigation, they can also be required to do so at every subsequent stage in the proceedings where notice to class members is deemed appropriate. The *amici curiae* maintain that the compelled disclosure by defendants of class action plaintiffs' views at *any* stage in the litigation is a

violation of the First Amendment, as it has been applied by this Court.

In short, the *amici curiae* and their members are firmly convinced that the Colorado Supreme Court erred as a matter of law in rejecting Mountain Bell's First Amendment challenge to the District Court's order. They are even more firmly convinced that the Colorado Supreme Court's opinion, if not reviewed and reversed by this Court, will adversely affect each company's ability to protect its business reputation by one of the primary means through which it establishes and safeguards that reputation, its periodic correspondence with its customers.

STATEMENT OF THE CASE

The *amici curiae* adopt Mountain Bell's Statement of the Case.

REASONS FOR GRANTING THE WRIT

For the reasons discussed below, the District Court's order at issue in this case, requiring a company to include in its periodic correspondence with its customers a notice of a class action lawsuit against it, raises a subject of national importance which this Court should review. The decisions of the District Court and the Colorado Supreme Court conflict with this Court's decision in *Pacific Gas and Electric* and the more recent decision of the United States Court of Appeals for the Seventh Circuit in *Central Illinois Light Co. v. Citizens Utility Board*, 827 F.2d 1169 (7th Cir. 1987).

THE DISTRICT COURT'S ORDER, UPHELD BY THE COLORADO SUPREME COURT, STANDS TO HARM ALL BUSINESSES THAT ARE FORCED TO DISTRIBUTE NOTICES OF CLASS ACTION LAWSUITS BROUGHT AGAINST THEM.

At issue in this case is the First Amendment right of a business corporation to freedom of speech. This Court has recognized that "[f]or corporations as for individuals,

the choice to speak includes within it the choice of what not to say." *Pacific Gas and Electric*, 475 U.S. at 16, *citing Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 248 (1974). In its judgment entered on July 24, 1989, the Colorado Supreme Court found that Mountain Bell's right to free speech was not violated by the District Court's order requiring the Company to distribute the class action notice over its objections. The Colorado Supreme Court's decision, however, rests upon a mischaracterization of the nature and content of that notice and upon a misunderstanding of its effect when distributed in Mountain Bell's own business correspondence.

A. A Class Action Notice Is Not "Objectively Neutral."

The Colorado Supreme Court acknowledges that "under some circumstances controlled access to a company's billing envelopes for purposes of transmitting a message antagonistic to the interests of the company might impermissibly abridge the First Amendment rights of the company." Petition at 17a. It denies that notice of a class action lawsuit is such a message, because "[t]he notice involved here is a message from the court, calculated to inform Mountain Bell customers of the nature of the pending litigation in which the customers might have some interest." *Id.* at 18a. The Colorado Supreme Court's characterization of the class action notice is disingenuous.

Although a class action notice may "emanate" from the court, *id.* at 21a, it is typically drafted by the plaintiffs and merely approved by the court before mailing. Further, the notice does not just provide potential class members "with factually accurate information with respect to their right to join in or be excluded" from the pending litigation. *Id.* at 17a. To the contrary, it reiterates the plaintiffs' unsubstantiated allegations of wrongdoing by the defendant, no matter how farfetched or scurrilous. Such allegations cannot in themselves be considered "objectively neutral information," *id.* at 18a,

and they are not rendered neutral by the subsequent recitation in the notice that the defendant has denied them. The allegations remain "antagonistic to the interests of the company," *id.* at 17a, and forced distribution of the notice does indeed abridge the defendant's First Amendment rights.

In *Central Illinois Light Co.*, the Seventh Circuit prohibited, as a violation of the First Amendment, a statutorily-created Citizens Utility Board from soliciting members and membership dues through envelope enclosures mailed by utilities along with their regular billings. The Board argued that it could limit the content of its enclosures to objective, informational, neutral speech. 827 F.2d at 1172-73. The court rejected that argument, in part on the ground that "the purpose, nature and activities of [the Board] necessarily produce speech that disagrees" with the utilities' views. *Id.* at 1173. The same can be said of class action plaintiffs: their speech, even tailored to fit a notice to potential class members, necessarily disagrees with the defendant's views.

Thus, a class action notice, drafted by the plaintiffs and repeating the allegations of the class action complaint, more nearly resembles "the messages of third parties, where the messages themselves are biased against or are expressly contrary to the corporation's views," *Pacific Gas and Electric*, 475 U.S. at 15 n.12, than "legal notices, such as notices of upcoming [Public Utility] Commission proceedings or of changes in the way rates are calculated." *Id.* As this Court has noted, the State may require utility companies to publish those kinds of legal notices, which are merely incidental to public utility regulation, but not the partisan messages of third parties. *Id.* The Colorado Supreme Court has failed to perceive the bias inherent in a class action notice and would require Mountain Bell to distribute it, contrary to the distinction drawn in *Pacific Gas and Electric.*

B. When Distributed By The Defendant, A Class Action Notice Is Not Subjectively Neutral.

Consistent with its mischaracterization of a class action notice drafted by the plaintiffs as a "message from the court," the Colorado Supreme Court belittles the possibility that "a customer would somehow construe the notice as an endorsement by Mountain Bell of the class action or a concession on its part that the pending lawsuit has merit." Petition at 18a. Similarly, it denies that the forced inclusion of the notice in Mountain Bell's monthly billing envelopes would place the Company "in the position of associating with the allegations of the complaint or with any message with which it disagrees" or "being compelled to respond to a message where it might otherwise have preferred to remain silent." *Id.* (footnote omitted). The Colorado Supreme Court's position is at odds with common sense and experience.

As Justice Holmes acknowledged long ago, in First Amendment matters "the character of every act depends upon the circumstances in which it is done." *Schenck v. United States*, 249 U.S. 47, 52 (1919); *see also Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980) (of particular importance is "the medium by which the statement is disseminated and the audience to which it is published"). Thus, common sense leads to the conclusion that the First Amendment right to free speech would not protect a man in falsely shouting "fire" in a crowded theatre and causing a panic. *See Schenck*, 249 U.S. at 52. In this case, common sense suggests that requiring a company to send a class action notice drafted by the plaintiffs along with the company's regular billing correspondence would give such notice a dignity it would not have if it were mailed by the plaintiffs under separate cover. Even if customers do not mistake the notice for a concession by the company as to the merits of the lawsuit, they may be more inclined to accept the plaintiffs' allegations as true when they see

that the company itself has sent them the notice. At a minimum, the inclusion of a class action notice in a company's periodic correspondence with its customers can only derogate from the company's efforts to create and protect its goodwill.

In *Pacific Gas and Electric*, this Court held unconstitutional an order requiring utilities to allow a consumer group to use the "extra space" in their billing envelopes four times a year to disseminate the group's potentially-hostile opinions. The Court observed that "forced associations that burden protected speech are impermissible." 475 U.S. at 12; *see also id.* at 21 (Burger, C.J., concurring). It sufficed, in the Court's analysis, to constitute such an impermissible forced association that the utilities were required to disseminate the third party's speech in envelopes that the companies owned and that bore their return address. *Id.* at 18. In this case, since the class action allegations are *not* those of the Colorado District Court, but rather those of the plaintiffs, the forced mailing of the class action notice containing the allegations would suffice to associate them with Mountain Bell.

Similarly, because the Colorado Supreme Court misconstrues the notice as containing only objectively neutral information, it does not appreciate that Mountain Bell may feel compelled to respond to the notice that the District Court's order will force it to diseminate. Indeed, whereas Mountain Bell might choose to say nothing of the class action lawsuit if the plaintiffs were mailing the notice, if the Company is forced to include the notice in its monthly billing envelopes, it may feel constrained also to use a newsletter or other regular notice to its customers to discuss the suit and defend its position. "The danger that appellant will be required to alter its own message as a consequence of the government's coercive action is a proper object of First Amendment solicitude, because the message itself is protected . . . ." *Id.* at 16. Even if the Company does not respond, its message will

have been altered by the mere inclusion of the class action notice.

C. A Class Action Notice Is Not Commercial Speech.

The Colorado Supreme Court relies upon the principle that commercial speech is afforded less protection under the First Amendment than is non-commercial speech, Petition at 15a-16a, but it simply does not understand the true nature of commercial speech. In the Colorado Supreme Court's view, a "court-ordered notice of a class action involving a commercial transaction between the company and its customers" is commercial speech. *Id.* at 17a. That view is not in accord with this Court's prior holdings.

This Court's commercial speech doctrine rests heavily on "the 'common-sense' distinction between speech proposing a commercial transaction . . . and other varieties of speech." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985), *quoting Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978); *see also Board of Trustees v. Fox*, —— U.S. ——, 109 S. Ct. 3028, 3031 (1989).

The class action notice at issue in this case does not propose a commercial transaction, nor is it even speech by a commercial entity. Rather, the notice is about a lawsuit against Mountain Bell by some of its customers. To the extent that it advertises anything, *see Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561-62 (1980), it advertises that lawsuit. It would be wholly inappropriate, therefore, to require Mountain Bell to mail out the class action notice on the theory that the notice is commercial speech. Moreover, "[b]ecause 'commercial speech' is afforded less constitutional protection than other forms of speech, it is important that the commercial speech concept not be defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed." *Id.* at 579 (Stevens, J., concurring). The Colorado Supreme Court's

definition would stretch commercial speech far beyond the bounds deemed proper by this Court.

D. A Class Action Notice Can Be Distributed Without Sacrificing First Amendment Rights.

According to the Colorado Supreme Court, this Court's decision in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978), stands for the proposition that "in a case where a defendant can perform the task of sending notices to class members by simply enclosing the notices in the defendant's periodic mailings to class members, at no additional or at most insubstantial expense to the defendant, a court is certainly justified in requiring the defendant, rather than the representative plaintiff, to perform the task of mailing the class notices to class members." Petition at 14a. In fact, *Oppenheimer* does *not* stand for that proposition, because the case dealt with whether defendants should pay for compiling a list of class members rather than whether defendants should mail the notices to them, 437 U.S. at 360, and because the cases cited in a footnote to the opinion, *id.* at 355 n.22, did not order defendants to accomplish such mailings. *See* Petition at 10 n.6.

All *Oppenheimer* says is that in some instances, "the defendant may be able to perform a necessary task with less difficulty or expense than could the representative plaintiff. In such cases, we think that the court properly may exercise its discretion under Rule 23(d) to order the defendant to perform the task in question." 437 U.S. at 356. Even that proposition, however, is limited in two respects. First, courts must not stray too far from the principle that the representative plaintiff should bear all costs relating to the sending of notice, because it is the plaintiff who seeks to maintain the suit as a class action. *Id.* at 359. And second, when freedom of speech is at stake, courts also must not disregard the First Amendment rights of defendants. *See Riley v. National Fed'n of the Blind*, —— U.S. ——, 108 S. Ct. 2667, 2676 (1988); *Pacific Gas and Electric*, 475 U.S. at 19 (citing cases).

That is, "[w]here a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980); *see Pacific Gas and Electric*, 475 U.S. at 20; *Wooley v. Maynard*, 430 U.S. 705, 716 (1977). In this case, the state's interest, as expressed in Colorado Rule 23(c)(2), in "direct[ing] to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort," Petition at 41a-42a, can be satisfied without requiring Mountain Bell to mail the notices. That is because Mountain Bell is willing to turn over to the plaintiffs its customers list for just that purpose.

Armed with this list, plaintiffs would be free to mail the class action notices themselves, without requiring judicially-enforced access to Mountain Bell's monthly billing envelopes. Instead, however, plaintiffs proposed to the District Court that they could save approximately $200,000 in postage if the court ordered Mountain Bell to include the notices in its own envelopes and thus subsidize the cost of mailing them. *See id.* at 9.

Mountain Bell has approximately 1.2 million residential customers in Colorado and some 235,000 business customers. *Id.* at 2a. By persuading the District Court to order Mountain Bell to mail the class action notices, and the Colorado Supreme Court to uphold that order, the plaintiffs stand to save roughly 14 cents in mailing costs per potential class member. They have done so, however, by riding roughshod over Mountain Bell's First Amendment freedom of speech. Yet this Court has stated, in no uncertain terms, that when evaluating more or less efficient means to achieve a societal end, "we reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley*, 108 S. Ct. at 2676, *citing Schaumburg v.*

Citizens for a Better Environment, 444 U.S. 620, 639 (1980); *Schneider v. State*, 308 U.S. 147, 164 (1939).

The *amici curiae* submit that the District Court's order, and the judgment of the Colorado Supreme Court upholding it, did just that.

CONCLUSION

For the foregoing reasons, as well as those stated by Mountain Bell in its petition, the writ of *certiorari* should be granted.

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